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TRA DOCKET ROOM
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June 8, 2005

VIA HAND DELIVERY

Honorable Pat Miller, Chairman
c/o Sharla Dillon, Docket & Records Manager
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

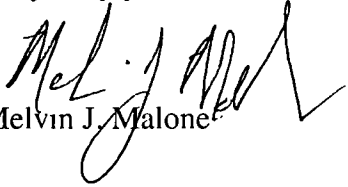
RE: *Petition of Frontier Communications, Inc. For a Declaratory Ruling*
TRA Docket No. 04-00379

Dear Chairman Miller

Enclosed please find one (1) original and thirteen (13) copies of the Preliminary Brief of the Intervening Cooperatives, submitted on behalf of Bledsoe Telephone Cooperative, DTC Communications, Highland Telephone Cooperative, Inc., North Central Telephone Cooperative, Inc., Twin Lakes Telephone Cooperative Corporation, West Kentucky Rural Telephone Cooperative, Inc. and Yorkville Telephone Cooperative, Inc. The enclosed document has been served on the parties of record.

We have also enclosed one copy of the document to be file stamped for our records. If you have any questions or need additional information, please let us know.

Very truly yours,


Melvin J. Malone

Enclosures

cc: Guilford F. Thornton, Jr
H. LaDon Baltimore

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**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

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IN RE:

**PETITION OF FRONTIER) DOCKET NO. 04-00379
COMMUNICATIONS, INC. FOR A)
DECLARATORY RULING)**

PRELIMINARY BRIEF OF THE INTERVENING COOPERATIVES

Bledsoe Telephone Cooperative, DTC Communications, Highland Telephone Cooperative, Inc., North Central Telephone Cooperative, Inc., Twin Lakes Telephone Cooperative Corporation, West Kentucky Rural Telephone Cooperative, Inc. and Yorkville Telephone Cooperative, Inc (collectively the "Intervening Cooperatives"), by and through their undersigned counsel, respectfully submit this Preliminary Brief of the Intervening Cooperatives, pursuant to the May 27, 2005, *Order Establishing Briefing Schedule* in this Docket.¹ Further, the Intervening Cooperatives support the Initial Brief of Ben Lomand Rural Telephone Cooperative, Inc.

I.

BACKGROUND

Frontier Communications, Inc. ("Frontier") filed its *Petition Of Frontier Communications, Inc. For Declaratory Ruling That It Can Provide Competing Services In The Territory Currently Served By Ben Lomand Rural Telephone Cooperative, Inc.* (the "Petition")

¹ The Intervening Cooperatives do not waive any arguments or defenses not set forth herein and reserve the right to assert the same

on October 26, 2004. Ben Lomand Rural Telephone Cooperative, Inc. ("Ben Lomand Cooperative") submitted its *Answer and Motion to Dismiss Of Ben Lomand Rural Telephone Cooperative, Inc* on December 4, 2004. The Tennessee Regulatory Authority ("TRA" or "Authority") convened a contested case on December 13, 2004, and memorialized the same in its February 16, 2005, *Order Convening A Contested Case Proceeding and Appointing A Hearing Officer*. Thereafter, the Intervening Cooperatives were granted permission to participate herein.

A Status Conference was held on April 27, 2005. At the Status Conference, the Hearing Officer, Jean A. Stone, directed the parties to file briefs addressing threshold issues on June 8, 2005, and reply briefs on June 15, 2005.

II.

ARGUMENT

In its Petition, Frontier asserts that the Authority granted it a "statewide" certificate of convenience and necessity as a competing telecommunications provider and that said certificate of convenience and necessity provides Frontier with the "necessary authorization" to provide competing telephone service in areas served by Ben Lomand Cooperative.² In sum, as pled the thrust of the Petition rests upon the "statewide" certificate of convenience and necessity.³ The Petition, however, as shown below, squarely contradicts both Frontier's own understanding of its certificate of convenience and necessity and its recent acknowledgement that an additional order, and perhaps even a court order, would be required before, and if, Frontier could provide the services that it seeks to provide in Ben Lomand Cooperative's territory.

² Petition, p 1 The June 27, 1996, Order, upon which Frontier relies, was issued in *In Re Application of Citizens Telecommunications Company, D/B/A Citizens Telecom For A Certificate of Convenience and Necessity*, TPSC Docket No 96-00779

³ In its reliance upon the interconnection agreement between Frontier and Ben Lomand Cooperative, Frontier again rests on the June 27, 1996, Order as providing it authority to operate in the area served by Ben Lomand *Id* at 2 ("This Agreement will become effective upon (a) the issuance of a final order by a regulatory body or court with the requisite jurisdiction to grant Citizens with all necessary regulatory approval and certification to offer local exchange and local exchange access services in the geographic areas to which this Agreement applies[]")

Therefore, a primary threshold question before the Authority in this matter is whether the June 27, 1996,⁴ Order (hereinafter “the June 1996 Order”) could have granted Frontier the authority to provide telephone service throughout the State of Tennessee, without any exceptions.⁵ If the answer to this threshold question is in the negative, the Petition should be dismissed, as a matter of law, as the requested relief is on its face barred and/or for failure to state a claim upon which relief can be granted.

To be sure, the June 1996 Order was executed after the passage of both the Tennessee Telecommunications Act of 1995 and the Federal Telecommunications Act of 1996. Still, neither act contains express language granting a competing provider the authority to operate within the area served by a Tennessee telephone cooperative. In fact, Tennessee’s Telecommunications Act of 1995, contained a then valid provision that prohibited competition within certain areas within the state.⁶ Other Tennessee statutes prohibit competition within the geographic areas served by Tennessee telephone cooperatives.⁷

Thus, at the time the June 1996 Order was issued, the Tennessee Public Service Commission, as a matter of law, could not have intended that said order granted the applicant “statewide” authority, as that term is currently construed in the Petition. At the time that the June 1996 Order was issued, the term “statewide,” as it appeared in the May 30, 1996, Initial Order, could have only meant, as a matter of law, “statewide” authority, consistent with the law.

The foregoing contention is bolstered further by both the pre-filed direct testimony submitted by Citizens Telecommunications Company (“Citizens”) in support of its application

⁴ See n 1 *supra*

⁵ Rather than seeking a declaratory ruling on the question of whether a competing provider can provide telephone service in the geographic area traditionally served by Ben Lomand Cooperative, Frontier has asked for a declaratory ruling “that Frontier [already] has the necessary authorization to provide competing telephone services in areas served by Ben Lomand Rural Telephone Cooperative, Inc.” Petition, p 1 See also Petition, p 3, para 7, and p 3, para 9 (“Frontier has already been granted a certificate of convenience to operate statewide”) (emphasis added)

⁶ Tenn Code Ann § 65-4-201(d)

⁷ See, e g, Tenn Code Ann §§ 65-4-101, 65-4-201, 65-29-101 *et seq*, and 65-29-130

and the proposed Initial Order submitted to the Administrative Law Judge by Citizens Telecommunications Company on May 20, 1996. The Direct Testimony of Bryan C. Spielman, on behalf of Citizens Telecommunications Company, contained the following exchange:

Q. Mr. Spielman, are you familiar with T.C.A. § 65-4-201(d)?

A. Yes, I am. I have reviewed and discussed that statutory provision with our counsel. As I understand the provision, incumbent local exchange telephone companies with fewer than 100,000 total access lines in Tennessee are exempt from local exchange competition unless it enters into a voluntary interconnection agreement with a competing telecommunications carrier or applies for authority to provide telecommunications services outside its service area existing on June 6, 1995.⁸ (emphasis added).

Moreover, the proposed Initial Order – proposed by Citizens/Frontier itself – provided the following:

The Applicant does not intend to provide service to customers located in areas served by an incumbent local exchange company with fewer than 100,000 access lines or by a telephone cooperative, unless otherwise permitted by the Commission or by applicable federal or state statutes, rules or regulations.⁹ (emphasis added).

Although this language is not within the May 30, 1996, Initial Order issued by the TPSC's Administrative Law Judge, it evidences, nonetheless, what Citizens Telecommunications Company considered to be then existing law. In June 1996, Citizens Telecommunications Company's own opinion was that a competing provider could not be granted authority by the Tennessee Public Service Commission to compete statewide.¹⁰

⁸ Direct Testimony of Bryan C. Spielman on Behalf of Citizens Telecommunications Company, D/B/A Citizens Telecom, *In Re Application of Citizens Telecommunications Company, D/B/A Citizens Telecom For A Certificate of Convenience and Necessity*, TPSC Docket No. 96-00779, p. 3 (May 14, 1996).

⁹ May 20, 1996, (proposed) Initial Order, p. 3. The ordering clause of the proposed Initial Order provided in part "That the application to provide service statewide, except as such portions of any county which is served by an incumbent local exchange telephone company with fewer than 100,000 total access lines or by telephone cooperatives []" *Id.* at 5 (emphasis added).

¹⁰ For example, Certificate of Convenience and Necessity orders issued by the TRA during this same time period expressly noted the Tenn. Code Ann. § 65-4-201(d) exemption. The statutes establishing protection from competition for cooperatives were likely not also mentioned only because cooperatives are not regulated by the TRA.

In further support of the above, it must not be overlooked that the express language of the 2004 Interconnection Agreement between Frontier and Ben Lomand Cooperative, which is attached to the Petition as Exhibit B, further evidences that it was the understanding of the parties that a prospective ruling would be required before Section 13.1(a) of said agreement would be satisfied. Specifically, Section 13.1(a) conditions the effectiveness of the agreement upon the subsequent issuance of "a final order by a regulatory body or court with the requisite jurisdiction to grant FCA with all necessary regulatory approval and certification[.]" and Section 13.1 then provides in part as follows:

The Parties recognize that, in the absence of a final order under subsection (a) immediately above, a question of law exists with respect to whether the Commission has statutory authority to authorize FCA or any other carrier to provide local exchange and/or local exchange access services in the areas of the State of Tennessee served by BLTC or other telephone cooperatives. Notwithstanding this uncertainty, the Parties have acted in good faith to negotiate this Agreement and fulfill their obligations under the Act in order to avoid unnecessary dispute and delay. (emphasis added).

Hence, by the plain language of the above-referenced Interconnection Agreement, and thus the memorialized agreement of the parties, it appears that the June 1996 Order did not then, and cannot now, satisfy Section 13.1(a). Not only did Citizens Telecommunications Company know that it did not have authority to compete in Ben Lomand Cooperative's territory in 1996 (proposed Initial Order), but Frontier acknowledged the same understanding yet again as late as 2004 (Interconnection Agreement).

III.

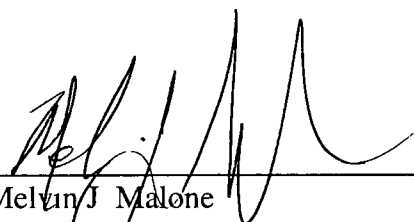
CONCLUSION

As demonstrated above, as a matter of law the June 1996 Order could not have given Frontier "statewide" authority, as that term is now employed by Frontier. Additionally, neither

the May 30, 1996, Initial Order nor the June 1996 Order contain any language indicating that a change of law, in the event such should occur, would be self-effectuating with respect to Frontier's operating authority in the State of Tennessee.¹¹

For the foregoing reasons, the Petition should be dismissed, as a matter of law, as the requested relief is on its face barred and/or for failure to state a claim upon which relief can be granted.

Respectfully submitted,



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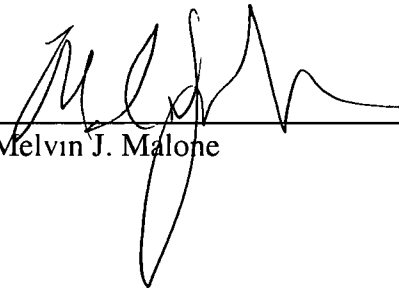
¹¹ Tenn Code Ann § 65-4-201(b) *See also, e.g., Order Approving Application of Level 3 Communications, LLC, to Amend Its Certificate of Public Convenience and Necessity, In Re Application of Level 3 Communications, LLC To Expand Its Certificate of Convenience and Necessity To Provide Facilities-Based Local Exchange And Interexchange Telecommunications In All Tennessee Service Areas, TRA Docket No 02-00230 (June 28, 2002) (Level 3 expressly sought an amended CCN from the TRA with expanded operating authority upon a change of law)*

Certificate of Service

I hereby certify that a true and correct copy has been forwarded via U.S. Mail to the following on this the 8th day of June, 2005.

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